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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-68
)	
ALFRED F. D'AGOSTIN, JR.,)	Honorable
)	Marmarie J. Kostelny,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Defense counsel was not ineffective for calling the State's informant as a witness in his case-in-chief: counsel's decision was reasonably strategic, as the informant's testimony at least partly supported defendant's entrapment defense.

¶ 2 Defendant, Alfred F. D'Agostin, Jr., appeals his conviction of delivery of 1 or more but less than 15 grams of cocaine within 1,000 feet of a school (720 ILCS 570/401(c)(2), 407(b) (West 2010)). He contends that his counsel was ineffective when he called the State's informant as a witness as part of his case-in-chief. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged on January 11, 2011, after he sold cocaine to an undercover police officer 232.7 feet from a school. Defendant's phone number had been provided to the police by an informant, C.M. Before trial, defendant's counsel, Michael Tatman, stated that he anticipated asserting entrapment as an affirmative defense. Tatman also filed a motion *in limine* stating that he planned to call C.M. during his case in chief and seeking leave to examine him as an adverse party or hostile witness. The court denied the motion, stating that it would not find C.M. to be an adverse party before trial, but indicating that, if C.M. refused to answer questions, Tatman could seek to use leading questions at that time. Four days later, the State filed its witness list. C.M. was not listed.

¶ 5 On February 6, 2012, a jury trial began. Officer Kevin Stankowitz of the Carpentersville police department testified that another officer gave him defendant's telephone number to call to try to purchase cocaine. Stankowitz knew that the phone number came from an informant, but he did not work directly with the person. According to Stankowitz, when he called the number, "Al" answered. Stankowitz asked for an "eight-ball," which is approximately 3.5 grams of cocaine, and suggested meeting at a McDonald's restaurant. He did not discuss how much he would pay for the cocaine. Stankowitz did not use his own name during the call and could not recall the name that he used. After the initial call, defendant called Stankowitz several times, and Stankowitz gave him directions to the McDonald's.

¶ 6 Stankowitz drove to the McDonald's, parked, and a few minutes later saw a minivan pull into the lot and stop directly behind his vehicle. Defendant was a passenger in the van. It was driven by another male, and a female was in the front passenger seat. Defendant walked to Stankowitz's vehicle, opened the passenger door, and placed several items inside. Stankowitz remembered seeing a hat and gloves. Defendant then got in the vehicle and asked Stankowitz if

he had the “loot.” Stankowitz asked to see the cocaine, defendant handed it to him, and Stankowitz began to count out money. Defendant was then arrested and stated, “I’m not the biggest drug dealer in the world.”

¶ 7 Another officer, Chris Bognetti, who was nearby in an undercover vehicle, testified about the events in a manner consistent with Stankowitz’s account. Bognetti saw defendant put a coat into Stankowitz’s vehicle. When Bognetti interviewed defendant at the police station, defendant told him that he paid someone in Rockford \$100 for the cocaine.

¶ 8 Bognetti was also the officer who worked with C.M. He said that C.M. was providing information to the police under an agreement for a better deal in his own case. As part of the agreement, C.M. was to come up with targets for the police to attempt to purchase narcotics from.

¶ 9 The defense called C.M. as a witness in its case-in-chief. The record is silent regarding whether Tatman had previously spoken with C.M. or knew how he would testify. C.M. admitted that he was arrested in August 2010 and faced various charges. He had been told that he could face up to seven years in prison. C.M. entered into an agreement with the police under which he would provide them with targets that resulted in three arrests on Class 1 or greater felony drug charges. If he did so, a Class 2 felony charge of unlawful use of a weapon would be reduced to a Class 3 felony and he would receive 24 months’ probation. C.M. said that he thought the agreement meant that he had to arrange deals between three people and himself and then turn them in. He stated that he was trying to save himself from prison and that otherwise he would not put his life in jeopardy.

¶ 10 C.M. denied having ever met defendant. He said that he had been given defendant’s name and phone number and was told that defendant was a drug dealer. He said that he called

defendant about purchasing cocaine twice and that defendant repeatedly called him back and tried to push a larger amount of cocaine on him. C.M. said that he worked plowing snow at O'Hare airport. He denied that he ever promised defendant a job or asked defendant to come work for him.

¶ 11 C.M. denied giving defendant's phone number to the Carpentersville police to arrange a drug deal, but later said that he might have done so in order to let them know who they were dealing with in order to take safety precautions. He said that he told Bognetti about drug dealers and that Bognetti told him how to set up the deals. C.M. said that he tried to set up a deal with defendant, but that it did not work out.

¶ 12 Defendant testified that he met C.M. through a friend. He said that C.M. came to his home to hang out and that they exchanged phone numbers. Defendant thought that they were friends. Defendant was unemployed and discussed the possibility of a snow plowing job with C.M.. According to defendant, C.M. asked him three times between October and November 2010 to get cocaine for him, and defendant refused. Defendant had previously been arrested for a drug offense and said that he had learned his lesson.

¶ 13 According to defendant, in early January 2011, C.M. again called and asked for an eight-ball. Defendant refused, and C.M. said that he would send a buddy to pick it up so that defendant would not have to drive so far. Defendant still refused. Defendant testified that, on January 11, 2011, C.M. left a message saying that he had work for defendant plowing snow at Midway airport. He said that he needed two people and that he had another person named "Jason" lined up. C.M. asked defendant to bring him some cocaine, and defendant refused. According to defendant, C.M. then said that, if defendant would not bring cocaine, he would hire someone else. After several more conversations, defendant agreed to get the cocaine for C.M.

and bring it to the job. He testified that his unemployment had just run out and that he was desperate for work.

¶ 14 Defendant testified that his vehicle was not working. When “Jason,” who turned out to be Stankowitz, called him, arrangements were made for them to meet at the McDonald’s restaurant. Jason would give defendant a ride to the job site and give him \$20 gas money to give to Larry Brown, his ex-girlfriend’s grandfather, who would drive defendant to the McDonald’s. Defendant testified that, during the conversations, Jason did not ask defendant for drugs. Defendant borrowed money from Brown to purchase the cocaine, and Brown drove defendant to the McDonald’s. Defendant got out of the van and put his work gear, consisting of coveralls, coats, hats, socks, and boots, into the waiting vehicle. He asked Jason for the gas money, and Jason asked to see the cocaine. Defendant thought that Jason was probably a user, and he got it out to show to him. Defendant was then arrested. Defendant did not see Jason count out any money. On cross-examination, defendant admitted that he had been convicted of selling cocaine in 2001. He said that he had not sold drugs in over a decade but that he still used drugs.

¶ 15 The defense next called Bognetti, who testified that he worked with C.M. beginning in October 2010. Bognetti gave C.M. instructions on how to get targets and suggested that he could satisfy the agreement by helping the police find a large amount of cocaine or by getting someone to sell drugs to an undercover officer. He also suggested that C.M. could purchase drugs as part of a controlled situation. Bognetti never suggested that C.M. buy drugs on his own or negotiate for the purchase of drugs.

¶ 16 The State called officer Robert Swank in rebuttal, who testified about defendant’s activity leading to his arrest in January 2001. Bognetti also testified in rebuttal that C.M. gave him defendant’s phone number and that he gave that to Stankowitz, but that he never instructed

Stankowitz to pretend to be C.M.'s coworker. Finally, Stankowitz testified in rebuttal that he never discussed a job with defendant, but he also acknowledged that he told defendant that he knew C.M.. He said that he did not pretend to be a coworker of C.M. and that he negotiated a price of \$200 for the cocaine and \$20 for gas.

¶ 17 The jury found defendant guilty, and he was sentenced to 12 years' incarceration. Defendant moved for a new trial, but did not allege ineffective assistance of counsel. The motion was denied, and he appeals.

¶ 18

II. ANALYSIS

¶ 19 Defendant contends that he was denied effective assistance of counsel when Tatman called C.M. as a witness in his case-in-chief, since C.M.'s testimony was particularly damaging to his entrapment defense. He notes that C.M. was not on the State's witness list and that, even if C.M. could have been called as a rebuttal witness, at that point Tatman would have been able to ask leading questions. Thus, he argues that there was no reasonable trial strategy for calling C.M. as a witness. The State sets forth various theories as to why Tatman might have strategically decided to call C.M. as a witness.

¶ 20 In determining whether a defendant was denied effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Id.* at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. *Id.* at 219-20. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 21 As to the first prong of the test, “ ‘in order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy.’ ” *People v. Manning*, 241 Ill. 2d 319, 327 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)). Mistakes in strategy or tactics do not, alone, amount to ineffective assistance. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 22 “ ‘Matters such as whether to put a witness on the stand at trial are generally matters of trial strategy.’ ” *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82 (quoting *People v. Eggleston*, 363 Ill. App. 3d 220, 226 (2006)). “A defendant can overcome the strong presumption that defense counsel’s choice of strategy was sound if his or her decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy.” *Id.* For example, ineffective assistance has been found when counsel elicited evidence that prejudiced the defense case with no legitimate tactical purpose. See *People v. Orta*, 361 Ill. App. 3d 342, 347 (2005). Ineffective assistance has also been found when counsel elicited testimony that was so damaging that it resulted in an unfair trial. See *People v. Bailey*, 374 Ill. App. 3d 608, 615 (2007). However, “[n]either mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent.” *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998).

¶ 23 Here, defendant argues that his attorney’s decision to call C.M. as a witness was ineffective assistance as a matter of law because there could be no valid trial strategy for eliciting

testimony that was so damaging to his entrapment defense. The State argues that multiple reasonable strategies could apply.

¶ 24 “ ‘Entrapment requires that a defendant show both that the State improperly induced him or her to commit a crime and that he or she was not otherwise predisposed to commit the offense.’ ” *People v. Bonner*, 385 Ill. App. 3d 141, 145 (2008) (quoting *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006)).

¶ 25 “ ‘A defendant who raises entrapment as an affirmative defense to a criminal charge necessarily admits to committing the crime, albeit because of improper governmental inducement.’ ” *Id.* (quoting *People v. Rivas*, 302 Ill. App. 3d 421, 432 (1998)). “ ‘Once a defendant presents some evidence, however slight, to support an entrapment defense, the State bears the burden to rebut the entrapment defense beyond a reasonable doubt.’ ” *Id.* (quoting *Rivas*, 302 Ill. App. 3d at 432-33).

¶ 26 There is no entrapment unless the government “ ‘incited or induced’ ” the offense. 720 ILCS 5/7-12 (West 2010). “ ‘[E]ntrapment does not exist as a matter of law merely because a government agent initiates a relationship leading to a drug transaction.’ ” *Bonner*, 385 Ill. App. 3d at 145 (quoting *People v. Day*, 279 Ill. App. 3d 606, 612 (1996)). “ ‘But the inducement prong is met when the course of criminal conduct for which the defendant was convicted originated in the mind of a government agent who arbitrarily engaged in a relationship with the defendant and purposely encouraged its growth.’ ” *Id.* Generally, a defendant’s predisposition “ ‘is established by proof that the defendant was ready and willing to commit the crime without persuasion and before his or her initial exposure to government agents.’ ” *Id.* at 146 (quoting *People v. Criss*, 307 Ill. App. 3d 888, 897 (1999)).

¶ 27 Here, although C.M. contradicted portions of defendant's testimony, defendant cannot overcome the strong presumption that Tatman's decision to call C.M. as a witness in his case-in-chief was a matter of strategy. Although Bognetti provided evidence that C.M. was acting under an agreement as an informant, it was C.M.'s testimony that showed how desperate he was to avoid a prison sentence. Defendant could then better argue that C.M. had a strong motivation to entice him to obtain the cocaine. Further, C.M.'s testimony established that he did indeed work with snowplows, which in part corroborated defendant's testimony that C.M. offered him a job if he would obtain the cocaine. It also corroborated evidence that defendant brought winter clothing items with him when he met Stankowitz. Thus, C.M.'s testimony provided useful evidence for the defense's theory of entrapment while the defense was also able to argue that C.M. lacked credibility on the points where he contradicted defendant's testimony. As that would be a reasonable strategy, defendant has not shown that Tatman was ineffective for calling C.M. as a witness in his case-in-chief.

¶ 28

III. CONCLUSION

¶ 29 Defendant has not shown that counsel was ineffective. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 30 Affirmed.